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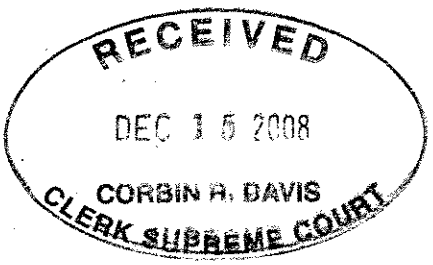
December 12, 2008



Corbin R. Davis, Clerk
Michigan Supreme Court
Michigan Hall of Justice
925 W. Ottawa
P.O. Box 30048
Lansing, MI 48909

Re: ADM File No. 2007-40; Amendment of MCR 7.205(F)

Dear Mr. Davis:

The Supreme Court has proposed two versions of a rule to deal with the question whether the time for a delayed application for leave is tolled while a claim of appeal is pending. This is in response to *Beavers v Barton Malow Co*, 480 Mich 1049 (2008), in which the Court permitted equitable tolling despite the absence of clear rule language, because prior decisions arguably had created an expectation among attorneys that tolling occurred in this situation.

The Appellate Practice Section, which wrote an amicus brief in *Beavers*, recently decided to support Alternative A. The Council's vote was very close. Alternative A provides that the 12-month limitation of MCR 7.205(F)(3) is tolled while an appeal is pending "pursuant to a claim of appeal." Alternative B provides that there is no such tolling. I do not think either alternative adequately balances the equitable considerations involved, so I disagree with the APS that the Court should adopt Alternative A, although if A and B were the only two choices, A is preferable. I write this letter on my own, not on behalf of the Appellate Practice Section.

The better choice, I submit, is something in between A and B. First, let me review when this situation arises. It arises when a party claims an appeal of right that later is dismissed for one reason or another without reaching the merits. If the original 12-month period of 7.205(F)(3) had not run at the time of dismissal, the appealing party could file a late application for leave to appeal under either alternative. There is only a problem when the original appeal has been pending so long that the 12-month period has expired. While general finality considerations tend to favor no tolling, in particular cases the policy of preferring to decide cases on their merits will apply with force and override finality concerns.

It seems to me that Alternative A would be the better choice if it were rewritten. As it's written now, an appeal of right could be pending for a year or more, and none of that time would shorten the 12-month clock of (F)(3). Assuming the appeal of right was timely claimed, only 21 days or less would run on the 12-month clock of (F)(3) before tolling kicked in.

A better formulation would give the appellant only 21 days to file a late application after the dismissal of the appeal of right, if the original 12-month period had elapsed or was about to elapse in less than 21 days. In cases where the appeal of right was dismissed with more than 21 days left on the original

12-month period, the appellant should have the rest of that period in which to apply for leave. Writing the rule that way would alleviate much of the "finality" concern with Alternative A.

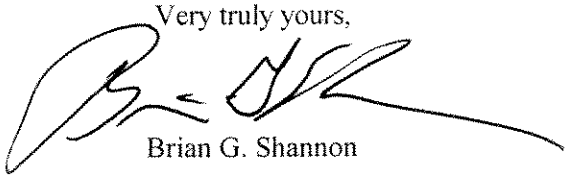
Another factor, important to Justice Corrigan, writing in dissent in *Beavers*, is what to do when the dismissal of the appeal is really the appellant's fault, not just some reasonable misunderstanding about arcane finality rules. My formulation eases that concern too, because it caps the amount of additional time an appellant can get for a late application.

Finally, what about the appellant who believes the court of appeals erred in dismissing the appeal of right and wants to solicit this Court's opinion on the issue before filing an application for leave on the merits? The best approach, I think, would be to permit the Supreme Court application to be decided first and have the rule provide 21 days after this Court denied leave to file a delayed application in the court of appeals. Apart from Supreme Court applications, the same question arises with respect to seeking reconsideration of the dismissal from the Court of Appeals itself. In some cases that will be by far the most time-efficient approach, when the Court of Appeals has made some clear error concerning its own jurisdiction.

Both of these concerns can be addressed easily by linking the end of the tolling period to the date on which the Court of Appeals dismissal order becomes "effective" under MCR 7.215(F)(1)(a). My Alternative A, then, would read:

> *(c) The 12-month limitation period provided in subrule (F)(3) is tolled for the period when an appeal is pending pursuant to a claim of appeal, until the order dismissing the appeal becomes effective under MCR 7.215(F)(1)(a), except as follows:*
>
> *(i) if more than 21 days remains in the original 12-month limitation period after the order dismissing the appeal becomes effective, then there is no tolling under this section; and*
>
> *(ii) if 21 or fewer days remain in the original 12-month limitation period after the order dismissing the appeal becomes effective, then an application for leave to appeal may be filed within 21 days after the date the order dismissing the appeal becomes effective.*

Very truly yours,



Brian G. Shannon

Enc.

cc: Barbara Goldman, Chair, Appellate Practice Section

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